Rangkaian Minang (NS) Sdn Bhd v Webe Digital Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-334–06 OF 2020
MOHD ARIEF JC
28 SEPTEMBER 2022

Contract — Breach — Terms — Contract between parties provided that rates chargeable for use of telecommunication structures would be reduced if there was an increase in the usage of the structures — Whether despite the increased usage plaintiff failed to reduce the charges resulting in defendant having overpaid plaintiff — Whether plaintiff had to refund the excess sum paid by defendant

The plaintiff and the defendant entered into a master licence agreement ('MLA') and an access agreement ('AA') ('the agreements') under which the defendant was granted a licence to use the plaintiff's telecommunication structures. Under the agreements, the defendant had to pay licence/access fees as well as electricity and administration charges in connection with the use of the structures. In the instant suit, the plaintiff claimed against the defendant for unpaid licence fees/access charges amounting to RM545,027.60 and outstanding electricity and administration charges totalling RM393,099.64 in addition to a 1.5% per month late-payment interest charge on those sums. In refuting the claim and raising a counterclaim, the defendant contended,, inter alia, that: (a) it was a term of the agreements that if there was an increase in the number of users of the structures per site, the plaintiff would reduce the charges in the manner specified in the schedules to the agreements. However, although the number of users using the structures had increased, the plaintiff never reduced the charges, resulting in the defendant overpaying the plaintiff by RM836,072.75; (b) the plaintiff had breached the agreements by failing to refund deposits paid by the defendant amounting to RM386,533.74; (c) all sums invoiced to the defendant by the former receivers and managers of the plaintiff had been fully paid; and (d) the plaintiff had mistakenly continued to bill the defendant for usage of the structures at the Taman Blossom site even after the defendant had notified the plaintiff that it had stopped using the telecommunication structures there.

Held, allowing both the plaintiff's claim and the defendant's counterclaim in part and ordering the plaintiff to pay the defendant the differential sum of RM284,479.25:

(1) The plaintiff's reply stating that the rates for the structures were determined by the letters of offer ('LOO') and not by the MLA and AA was an attempt to colour the way the agreements were to be read and to

add a new cause of action based on the alleged terms in the LOO. This was a departure from the plaintiff's original pleaded case and an attempt re-write the terms it had agreed upon with the defendant. The defendant was correct in saying that the rates, charges and discounts provided in the MLA and AA prevailed over the LOO. Furthermore, the MLA and AA contained an entire agreement clause that precluded the creation of any new obligations that might contradict the terms of the agreements (see paras 16, 19, 22, 25 & 31).

(2) The MLA and AA clearly stated that the LOO did not take precedence over the terms that appeared in the master agreements. Those agreements clearly stated that if the number of users of the structures increased, the plaintiff must reduce the charges. The defendant had proven to the court's satisfaction that the number of users had increased but the plaintiff had not reduced the rates. The amount claimed by the plaintiff was therefore far higher than what it was contractually entitled to. The plaintiff was contractually required to refund the amounts overpaid by the defendant. In respect of the seven new sites, however, there was no overbilling by the plaintiff and no reduction needed to be made as there was no increase in the number of users on the new sites. Therefore, in respect of these new sites, the plaintiff was entitled to the full amount of its claim without any interest thereon. Under the terms of the agreements, the plaintiff also had to refund the deposits paid by the defendant, amounting to RM386,533.74 (see paras 32, 34, 59, 57, 60–61 & 68–72).

(3) The plaintiff was not entitled under the MLA and AA to claim interest of 1.5% per month on any of the outstanding charges (see paras 62–63).

(4) The plaintiff was entitled under the agreements to claim for the full amount owing for electricity and administrative charges, but minus the 1.5% interest thereon (see para 73).

(5) The plaintiff was entitled to impose the relevant costs on the defendant for use of the structures in the Taman Blossom site because the defendant had not proven that its notice of termination of use of that site was served on the plaintiff in the manner prescribed under the agreements (see paras 51–56).

(6) The plaintiff did not err in invoicing the defendant for licence fees and charges that its former receivers and managers had mistakenly omitted to charge the defendant. These were charges the defendant was contractually bound to pay and could not escape from paying merely because the receivers and managers had made errors when issuing the invoices (see paras 45–50).

(7) The plaintiff's principal claim of RM938,127.24 was allowed; so was the defendant's counterclaim for refund of deposits amounting to

RM386,533.74 as well as the sum of RM836,072.75 that it had overpaid the plaintiff. Consequently, the plaintiff had to pay the defendant the difference, namely, the sum of RM284,479.25 (see para 83).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki perjanjian lesen induk ('PLI') dan Perjanjian Akses ('PA') ('perjanjian-perjanjian tersebut') di mana defendan telah diberikan lesen untuk menggunakan struktur telekomunikasi plaintif. Di bawah perjanjian tersebut, defendan perlu membayar fi lesen/akses serta caj elektrik dan pentadbiran berkaitan dengan penggunaan struktur tersebut. Dalam tindakan semasa, plaintif menuntut terhadap defendan bagi fi lesen/caj akses yang belum dibayar berjumlah RM545,027.60 dan bayaran elektrik dan pentadbiran tertunggak berjumlah RM393,099.64 sebagai tambahan kepada caj faedah pembayaran lewat 1.5% sebulan ke atas jumlah tersebut. Dalam menafikan tuntutan dan membangkitkan tuntutan balas, defendan berpendapat, antara lain, bahawa: (a) ia adalah terma perjanjian bahawa jika terdapat peningkatan dalam bilangan pengguna struktur setiap tapak, plaintif akan mengurangkan caj mengikut cara yang dinyatakan dalam jadual kepada perjanjian. Walau bagaimanapun, walaupun bilangan pengguna yang menggunakan struktur telah meningkat, plaintif tidak pernah mengurangkan caj, menyebabkan defendan terlebih membayar plaintif sebanyak RM836,072.75; (b) plaintif telah melanggar perjanjian dengan gagal memulangkan deposit yang telah dibayar oleh defendan berjumlah RM386,533.74; (c) kesemua invois yang dikira kepada defendan oleh bekas penerima dan pengurus plaintif telah dibayar sepenuhnya; dan (d) plaintif telah tersilap terus membuat bil kepada defendan untuk penggunaan struktur di tapak Taman Blossom walaupun selepas defendan telah memberitahu plaintif bahawa ia telah berhenti menggunakan struktur telekomunikasi di sana.

Diputuskan, membenarkan kedua-dua tuntutan plaintif dan tuntutan balas defendan sebahagiannya dan memerintahkan plaintif membayar defendan jumlah perbezaan sebanyak RM284,479.25:

(1) Balasan plaintif yang menyatakan bahawa kadar untuk struktur ditentukan oleh surat tawaran ('ST') dan bukan oleh PLI dan PA adalah percubaan untuk mewarnai cara perjanjian dibaca dan menambah kausa tindakan berdasarkan terma yang didakwa dalam ST. Ini adalah penyimpangan daripada kes asal yang diplidkan plaintif dan percubaan untuk menulis semula terma yang telah dipersetujui dengan defendan. Defendan betul dalam mengatakan bahawa kadar, caj dan diskaun yang diberikan dalam PLI dan PA mengatasi ST. Tambahan pula, PLI dan PA mengandungi keseluruhan klausa perjanjian yang menghalang penciptaan sebarang kewajipan baharu yang mungkin bercanggah dengan syarat perjanjian (lihat perenggan 16, 19, 22, 25 & 31).

(2) PLI dan PA dengan jelas menyatakan bahawa ST tidak diutamakan daripada terma yang terdapat dalam perjanjian induk. Perjanjian tersebut dengan jelas menyatakan bahawa jika bilangan pengguna struktur meningkat, plaintif mesti mengurangkan caj. Defendan telah membuktikan sehingga mahkamah berpuas hati bahawa bilangan pengguna telah meningkat tetapi plaintif tidak menurunkan kadar. Oleh itu, jumlah yang dituntut oleh plaintif adalah jauh lebih tinggi daripada yang ia berhak secara kontrak. Plaintif dikehendaki secara kontrak untuk membayar balik jumlah yang terlebih bayar oleh defendan. Berkenaan dengan tujuh tapak baharu, walau bagaimanapun, tiada pengebilan berlebihan oleh plaintif dan tiada pengurangan perlu dibuat kerana tiada peningkatan dalam bilangan pengguna dalam tapak baharu. Oleh itu, berkenaan dengan tapak baharu ini, plaintif berhak mendapat jumlah penuh tuntutannya tanpa sebarang faedah ke atasnya. Di bawah terma perjanjian, plaintif juga perlu memulangkan wang deposit yang telah dibayar oleh defendan, berjumlah RM386,533.74 (lihat perenggan 32, 34, 57, 59, 60–61 & 68–72).

(3) Plaintif tidak berhak di bawah PLI dan PA untuk menuntut faedah sebanyak 1.5% sebulan ke atas mana-mana caj tertunggak (lihat perenggan 62–63).

(4) Plaintif berhak di bawah perjanjian untuk menuntut amaun penuh terhutang bagi caj elektrik dan pentadbiran, tetapi ditolak faedah 1.5% ke atasnya (lihat perenggan 73).

(5) Plaintif berhak untuk mengenakan kos yang berkaitan ke atas defendan untuk penggunaan struktur di tapak Taman Blossom kerana defendan tidak membuktikan bahawa notis penamatan penggunaan tapak tersebut telah disampaikan kepada plaintif mengikut cara yang ditetapkan di bawah perjanjian (lihat perenggan 51–56).

(6) Plaintif tidak tersilap dalam menginvois defendan untuk fi dan caj lesen yang bekas penerima dan pengurusnya telah tersilap keluarkan untuk dikenakan kepada defendan. Ini adalah caj yang defendan terikat secara kontrak untuk membayar dan tidak boleh melepaskan diri daripada membayar hanya kerana penerima dan pengurus telah membuat kesilapan semasa mengeluarkan invois (lihat perenggan 45–50).

(7) Tuntutan prinsipal plaintif sebanyak RM938,127.24 telah dibenarkan; begitu juga tuntutan balas defendan untuk pembayaran balik deposit berjumlah RM386,533.74 serta jumlah RM836,072.75 bahawa ia telah terlebih bayar kepada plaintif. Akibatnya, plaintif terpaksa membayar defendan perbezaan, iaitu, jumlah RM284,479.25 (lihat perenggan 83).]

Cases referred to

Abdul Ravuff bin Datuk AS Dawood & Ors v Dr Abdul Rahiman bin Datuk AS Dawood (in his personal capacity and as administrator for the estate of Patama @ Ammaji Bibi bt Daud Sah) and other appeals [2022] 4 MLJ 379; [2022] 5 CLJ 829, FC (refd)
Attorney General of Belize v Belize Telecom Limited [2009] UKPC 10, PC (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)
Choo Kok Beng v Choo Kok Hoe [1984] 1 MLJ 165, PC (refd)
Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal [2006] MLJU 649; [2007] 3 CLJ 413, CA (refd)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)
Ismail bin Othman & Ors v Seacera Group Bhd & Ors [2022] MLJU 374; [2022] 1 LNS 442, HC (refd)
Khazanah Jaya Sdn Bhd v Hisco (Malaysia) Sdn Bhd [2021] MLJU 2625; [2021] 1 LNS 2196, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Lee Soh Hua v Kow Lup Piow & Ors [1984] 2 MLJ 101; [1984] 1 CLJ Rep 191, FC (refd)
Martlet Homes Ltd v Mulalley & Co Ltd [2021] EWHC 296 (TCC), QBD (refd)
Mat bin Lim & Anor v Ho Yut Kam & Anor [1967] 1 MLJ 13, HC (refd)
Mulalley & Co Ltd v Martlet Homes Ltd [2022] EWCA Civ 32, CA (refd)
Shanghai Hall Ltd v Chong Mun Foo & Ors [1967] 1 MLJ 254 (refd)
Tan Chong & Sons Motor Co Sdn Bhd v Alan Mcknight [1983] 1 MLJ 220; [1981] CLJ Rep 394, FC (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16, FC (refd)

Legislation referred to

Evidence Act 1950 s 91
Rules of Court 2012 O 18 r 10(1)

Ng Chin How (with Audrey Lim Shu Ting) (Chia Koay & Teng) for the plaintiff.
Jeyakumar Palakrishnar (with Asilah Aziz) (Zahir Jeya & Zainal) for the defendant.

Mohd Arief JC:

INTRODUCTION

[1] The plaintiff claims that the defendant owes it the following for failure by the latter to comply with the terms of the master license agreement ('MLA') and access agreement ('AA') both dated 15 September 2011.

[2] The amount claimed by the plaintiff can be seen in the amended statement of claim dated 16 October 2020 which is reproduced below:

20. Wherefore, the plaintiff claims from the defendant the following:

(a) RM 545,027.60 being the License Fees/Access Charges for both the new and existing telecommunication infrastructures as at 26.6.2020;

(b) RM54,547.41 being the late payment interest at the rate of 1.5% a month for the License Fees/Access Charges for both the new and existing telecommunication infrastructures;

(c) RM393,099.64 being the Electricity and Administration Charges as at 26.6.2020;

(d) RM47,479.81 being the late payment interest at the rate of 1.5% a month for the Electricity and Administration Charges as at 26.6.2020;

(e) Interest at the rate of 1.5% per month on the amount of RM1,040,155.46 from the date of this judgment to the date of full settlement; and

(f) Costs.

[3] The defendant on the other hand denies liability for the amount claimed by the plaintiff. Instead, the defendant contends that the plaintiff had committed a breach of the MLA and AA agreements.

[4] The defendant in its defence and counterclaim alleges that:

(a) it had paid the full sums invoiced and claimed by the receivers and managers and as such the plaintiff is not entitled to claim any further sums for the period invoiced by the said receivers and managers;

(b) the plaintiff had overbilled the defendant. The defendant is entitled to a reduction of the sums invoiced as the number of users of the structures had increased and therefore should attract the discount as agreed under the terms of the MLA and AA;

(c) the plaintiff had overbilled the defendant by including bills for Taman Blossom when that site was allegedly terminated by the plaintiff;

(d) the plaintiff had failed to consider the sums paid by the defendant from the amount invoiced to it; and

(e) the plaintiff had failed to deduct the deposits paid by the defendant to the sum of RM386,533.74.

[5] It is the defendant's case that the amount claimed by the plaintiff is excessive and wrong. As a result, the defendant counterclaims that the plaintiff is directed to pay to it:

35. Wherefore, the defendant claims against the plaintiff:

(a) Sum of RM 441, 925.93.

(b) RM 836, 072.75 being reconciliation for the downward revision'

(c) Damages;

(d) Interest thereon at the rate of 5% per annum from the date of filing this counterclaim to the date of judgment until realization; and

(e) Costs.

TRIAL OF THIS ACTION

[6] This trial was fixed on 21 December 2021, 22 December 2021, 8 February 2022, 9 February 2022, 10 February 2022 and 12 May 2022.

[7] The following witnesses were produced by the parties:

(a) plaintiff — Madam Subashani a/p Rajoo; and

(b) defendant:

(i) Siti Fatimah bt Osman; and

(ii) Shazrulnizam Huzairi bin Md Hashim

AGREED FACTS

[8] Parties had agreed to the facts that are contained in the statement of agreed facts dated 22 February 2021. Nothing much turns on the facts that were agreed by learned counsel for the litigants.

ISSUES TO BE DETERMINED

[9] After the trial of this suit, parties agreed that the following issues need to be determined by this court:

(a) whether the plaintiff is entitled to claim for the sites that were left out by the receivers and managers? (Issue 1);

(b) what are the applicable rates for the sites at issue? (Issue 2);

(c) whether the defendant validly terminated Taman Blossom site? (Issue 3);

(d) whether the defendant is entitled to deduct the deposit paid, alleged overpayment and alleged overbilling for failure to revise downwards the fees and charges for the sites (Issue 4);

(e) whether the plaintiff is entitled to its claim for late payment interest at rates claimed in the statement of claim (Issue 5);

(f) whether the plaintiff is entitled to its claim for the new sites? (Issue 6);

(g) whether the plaintiff is entitled to its claim for the electricity charges and administrative charges for Taman Blossom? (Issue 7) (related to Issue 3); and

(h) whether the plaintiff is entitled to claim for electricity charges and administrative charges for all the sites (Issue 8).

DECISION OF THIS COURT

Terms of the agreement to be considered

[10] The claim before me concerns the alleged breach of contract as contained in the AA and MLA.

[11] Therefore, I must start by determining the litigants' obligations under the terms of the AA and MLA and whether the terms contained in these documents override those contained in each of the letters of offers relied on by the plaintiff.

[12] I note the following material clauses that appear in the MLA and AA Agreements that for ease of convenience have been produced herein:

Master License Agreement (MLA)

Clause 4.1

4. TERM OF THE LICENSE

4.1 The license granted to P1 for the use of each of the Telecommunication Structures pursuant to this Agreement and the respective AWO(s) shall be for a period as stated in Paragraph 3 of Schedule 1 (License Term') at the License Fee stated in Schedule 1 hereto and subject to any Additional Infrastructure requested by P1 (if any) with an option to renew the same thereafter upon terms and conditions to be agreed between the Parties for a further period of Five (5) years PROVIDED ALWAYS that P1 shall have duly and punctually paid the License Fee and other monies herein reserved and shall have performed and observed the stipulations contained in this Agreement and the respective AWO(s) and on its part to be performed and observed up to the termination of the preceding term of the license under the respective AWO(s) and P1 shall have given written notice of its intention to exercise the option to renew aforesaid to SBC no less than Six (6) month prior to the expiry of the License Term.

Clause 5.1

5.1 LICENSE FEE

The monthly fee for the use of each of the telecommunication Structures shall be at the applicable rates stated in Schedule 1 of this Agreement and in some cases, with additions thereto as provided in this Agreement (License Fee') commencing from the Commencement Date and shall be payable in Ringgit Malaysia in advance on or before the seventh (7) day of each calendar month. In the event the

Commencement Date does not fall on the first (1) day of the calendar month, the License Fee for that calendar month shall be pro-rated accordingly.

Clause 5.3

5.3 In the event that during the duration of the License Term of any Telecommunication Structure, any of the Other Operators shall wish to take a license/rent/lease over a portion or portions of any Telecommunication Structures and the same is agreed to by SBC, upon written notification to P1, the Parties hereby agree that the License Fee payable by P1 sball drop to the lower tier as provided in Schedule 1 hereof at the commencement of the following month following the entry of the Other Operators.

Clause 6.1

6. INITIAL PAYMENTS

6.1 Within Seven (7) days after the Commencement Date, P1 shall pay to SBC or to its nominees the Security Deposit in the sum equalling three (3) months License Fee which sum shall be maintained without any deduction as security for the due observance and performance by P1 of all singular and several covenants, conditions, stipulations and agreements on the part of P1 herein contained and as contained in the respective AWO for the duration of this Agreement and the relevant AWO, together with the first month's License Fee in advance.

Clause 6.2

6.2 The payment of the Security Deposit shall not be treated towards payment of the License Fee or any part thereof unless otherwise agreed by both Parties and the same or any párt thereof may be appropriated by SBC at any time during the License Term or upon the expiration of the License Term towards any amount owing to SBC by P1 (if any) resulting from any breach of the due observance and performance by P1 of all and singular and several covenants and conditions on the part of P1 contained herein. Where such deduction is made during the License Term, P1 shall forthwith make good the difference so as to duly maintain the total amount of the payment of the Security Deposit stated above.

Clause 7(a)

7. PI'S COVENANTS

P1 hereby covenants with SBC in respect of each of the Telecommunication Structures as follows:

(a) Payment of License Fee

To pay the License Fee and including any government taxes thereon (for example Goods and Services tax (GST)) to SBC and/or to any party or parties as directed by SBC in writing to P1 at the times stated herein and in the AWO without any deduction;

Clause 7.1

(1) Insurance of Equipment

Shall throughout the period of the License Term procure to be effected at its own cost and expense and keep maintained an insurance policy for the Equipment which protects against loss, damage or destruction or personal injury or damage to person

A or property resulting from the operation, damage or anything falling off of it including a policy against any third party public liability for each incident within the statutory limits as required by the laws of Malaysia. P1 shall not hold SBC liable if the Equipment or any part thereof is damaged or lost unless such damage or lost is due to SBC's fault or negligence or breach of the terms of this Agreement. In the B event that the Equipment is damaged or lost due to the action or omission of the Other Operators, SBC shall undertake to indemnify P1;

Clause 7 (m)(i), (iii)

(m) Connection of Electricity and Settlement of Electricity Bills and another Outgoings;

C

(i) Shall duly and promptly settle all electricity bills and other charges in respect of all other outgoings incurred in connection with P1's use of the telecommunication Structure;

(ii) SBC shall apply from TNB for the connection of electricity to the D Telecommunication Structure under its own name and at its own costs and expenses and in the absence of electricity connection to the Land Site or in the event the relevant authority does not grant the supply of electricity or the relevant authority fail to supply electricity, P1 shall provide its own generator set unless otherwise agreed between the Parties;

E (iii) P1 further agrees specifically in relation to electricity bills (in the event that the connection of electricity to the Telecommunication Structure is under SBC's name, which shall be done at its own costs), the following shall apply:

(a) it is estimated that the charges per month payable by P1 to TNB for the supply of electricity to each Telecommunication Structure is at Ringgit Malaysia Six Hundred (RM600.00) only;

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(b) in order to assist P1 to increase its operational efficiency, SBC shall first pay to TNB on behalf of P1 such charges payable to TNB for the supply of electricity subject to the following conditions:

(1) P1 shall deposit with SBC a sum of Ringgit Malaysia Six Hundred (RM600.00) G only for each of the Land Sites it is occupying which is equivalent to one (1) month estimated electricity charges ('Electricity Deposit');

(2) P1 shall pay the sum of Ringgit Malaysia Six Hundred (RM600.00) only as the estimate charges for the supply of electricity for each Land Site together with the License Fee payable under Clause 5.1 hereof for any of the Land Sites they have H taken a license thereof (but payment to be made separately in separate cheque f or the License Fee and the electricity charges); and

(3) SBC shall be entitled to levy an administration cost of Ringgit Malaysia Eighteen (Rm 18.00) only per bill to P1 for a Land Site per month.

Clause 7(m)(c).

I C. the charges for the supply of electricity shall be reconciled every six (6) months in accordance to the actual bill issued by TNB for the usage of the electricity by Pl at the relevant Land Site in the following manner:

1. actual bills shall be reconciled against the estimated amount paid under Clause 7(m)(iii)(b)(2) above and any refund shall be made via credit notes or debit notes

(whichever is applicable) which will be raised and submitted to P1 by SBC and PI shall reimburse SBC for the actual electricity charges and administration costs referred to in Clause 7(m)(ii)(b)(3) above within thirty (30) days of P1 receipt of the invoice from SBC;

2. actual bills shall be reconciled against the estimated amount 30th March and 30th September of each year; and

3. The previous six (6) months average of electricity usage for a Land Site shall be used to estimate the following six (6) months advance payment for electricity charges stated in Clause 7(m)(i)(b)(2) hereof and in the event that the estimated amount exceeds the sum of Ringgit Malaysia Six Hundred (RM600.00) only, the higher estimated amount shall be paid by P1 to SBC;

Clause 10

10. ASSIGNMENT

The license granted under this Agreement and/or the AWOs is personal to P1 and P1 may not assign or otherwise transfer its rights or obligations thereunder without prior written consent of SBC or its permitted assigns save and except where such assignment is in favour of PI's wholly owned subsidiary or parent company, such consent shall not be required.

Clause 12.4

12.4 Notwithstanding the above provisions, P1 shall be entitled to terminate any of the AWO by giving thirty (30) days' written notice to SBC, on the occurrence of any one or more of the following events to the specific Land Site at any time during the License Term of the relevant AWO:

(a) early termination of the Tenancy Agreement between SBC and the owner(s) in respect of the Land Site, or

(b) any buildings, structures or works of any nature or kind whatsoever are erected in the vicinity of the Telecommunication Structure and/or the Land Site which screen, shield or interfere with the signals transmitted or received by the Equipment or

(c) the requisite approvals for the installation of the Equipment or the continuous use of the Telecommunication Structure cannot be obtained or are otherwise restricted in anyway (whether temporarily or otherwise) either by law, order, ordinance or regulation applicable in Malaysia; or

(d) the Telecommunication Structure or any part thereof shall become unsafe or unfit for occupation or use from any cause other than the act or default of P1; or (e) the government require SBC to dismantle any of the Telecommunication Structure on any of the Land Sites.

Upon such notice being given, the respective AWO shall absolutely cease and determine and P1 shall be entitled to the refund of the Security Deposit paid for the said Land Site.

Clause 13.1

13.1 TERM AND DETERMINATION OF LICENSE

A This Agreement shall be valid from the date hereof for a period of Fifteen (15) years unless terminated by any Party by giving three (3) months notice in advance. Parties may extend the duration of this Agreement upon terms and conditions agreed upon by them.

Clause 13.2

B 13.2 Any AWO executed pursuant hereto shall be valid and binding throughout the License Term and neither Party shall be entitled to terminate any AWO at any time during the License Term.

Clause 13.3

C 13.2 Unless otherwise provided herein, the Parties shall only be entitled to terminate the license granted under any AWO without assigning any reasons therefore after the expiry of the License Term upon giving Six (6) months' prior written notice of its intention to do so, and thereafter the respective AWO shall terminate and have no further force and effect upon expiry of the said six (6) months' notice subject nevertheless that in the event that P1 shall terminate any AWO poor to the expiry of the first ten (10) or seven (7) years thereof, whichever is applicable, the payment of Security Deposit made under Clause 6.1 herein for the respective AWO shall be forfeited by SBC and SBC shall be entitled to exercise Clause 12.2 hereof.

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E Clause 20.1

20. ENTIRE AGREEMENT

20.1 This Agreement is the complete and exclusive statement of this Agreement between the Parties relating to the subject matter or the Agreement and supersedes all previous communications and arrangements, written or oral.

F Both Parties acknowledge that no reliance is placed on any representations made but not embodied in this Agreement. The Schedules and Annexures hereto shall be read and construed as an essential and/or integral part of this Agreement.

Clause 20.2

G 20.2 This Agreement is to be read in the light of the spirit that it is intended and must be construed together with the AWO(s).

Clause 20.3

20.3 This Agreement shall be the principal Agreement antecedent to the AWO(s).

H Clause 24.2

24.2 A Notice sent shall be deemed to have been given:

(a) at the time of delivery, upon written acknowledgement of receipt by an officer or otherduly authorised employce, agent or representative of the receiving party, if delivered by hand;

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(b) when the machine sending the facsimile generates a report showing that the total number of pages of the facsimile were successfully sent to the facsimile number of the other party during the business hours in the place of its receipt or, if it is not, on the opening of business on the next succeeding business day in the place of its receipt, subject to its having in

fact been received in legible form, if such notice is sent by facsimile; and (c) after three (3) days from the date of posting, if sent by prepaid registered post.

Clause 24.3

24.3 All notices herein shall be in writing.

Schedule 1 — Tables and item 1 and item 2

SCHEDULE 1

LICENSE FEE & FORMULA FOR VARIATION ORDER

License Fee for 1st to 7st Year per month per User (excluding GST)

Tower Height	Single	2 Sharing	3 Sharing	4 Sharing	5 Sharing
150 feet	RM6,426	RM3,672	RM2,916	RM2,624	RM2,362
200 feet	RM8,883	RM5,076	RM4,104	RM3,694	RM3,324
250 feet	RM9,450	RM5,400	RM4,320	RM3,888	RM3,499
300 feet	RM12,075	RM6,900	RM5,500	RM4,950	RM4,455
350 feet	RM15,225	RM8,700	RM6,900	RM6,210	RM5,589
400 feet	RM17,325	RM9,900	RM7,900	RM7,110	RM6,399

License Fee for 8th Year and thereafter, per month per User (excluding GST) at a 25% discount.

Tower Height	Single	2 Sharing	3 Sharing	4 Sharing	5 Sharing
150 feet	RM4,820	RM2,754	RM2,187	RM1,968	RM1,772
200 feet	RM6,662	RM3,807	RM3,078	RM2,770	RM2,493
250 feet	RM7,088	RM4,050	RM3,240	RM2,916	RM2,624
300 feet	RM9,056	RM5,175	RM4,125	RM3,712	RM3,341
350 feet	RM11,419	RM6,525	RM5,175	RM4,658	RM4,192
400 feet	RM12,994	RM7,425	RM5,925	RM5,332	RM4,799

Access Agreement (AA)

Clause 1.1

CONDITION 1 — PRINCIPLES OF ACCESS TO INFRASTRUCTURE SHARING SERVICE

1.1 Provision and Usage of Infrastructure Sharing subject to Licence

1.1.1 The Infrastructure Sharing Services provided by the Access Provider shall at all times be subject to the terms and conditions under its Licence or at law. The Infrastructure Sharing Services provided to the Access Seeker shall only be used in connection with an activity or activities in which the Access Seeker is authorised to provide under its Licence.

Clause 3.1.1 (a), (b), (c)

CONDITION 3 — BILLING AND SETTLEMENT

3.1 Billing

3.1.1 (a) Due to the nature of the Access Provider's business and as agreed by the Operators herein, the Access Charges shall be payable on or before the Due Dale whether or not an Invoice had been forwarded by the Access Provider to the Access Seeker. In the event the Commencement Date does not fall on the first (1) day of the calendar month, the Access Charge for that calendar month shall be pro-rated accordingly.

(b) Unless otherwise agreed in writing, the Invoice for the Access Charges shall be in writing on an Operator to Operator basis and forwarded to the Access Seeker before the Duc Date. The Access Provider shall provide with each Invoice, such information as may be reasonably necessary for the Access Seeker to verify the rates and charges specified in the Invoice. In addition, the Access Provider shall provide the Access Seeker the billing report in electronic format upon request.

(c) All Invoices shall be delivered by hand or posted by registered mail or licensed courier to the billing representative and address of the Access Seeker as shall be notified in writing from time to time.

Clause 3.2.1 (a) and (b)

3.2 Terms of Payment

3.2.1 (a) Save for a disputed amount, the Access Seeker must make full payment of any Invoice to the Access Provider on or before the Due Date unless otherwise agreed in writing by both Operators.

(b) The Access Seeker to whom Infrastructure Sharing Services is provided under this Agreement must pay the Access Provider the applicable rates and charges, and on the terms and conditions set out or referred to, as the case may be, in this Agreement.

Clause 3.2.4

3.2.4 Save for disputed amounts, it is hereby expressly agreed that the Access Provider is entitled to the payment of interest without prejudice to any other rights of the Access Provider. Interest on due and unpaid amounts is payable (as well as before judgement and after judgment) at the rate of one percent (1%) per annum above Malayan Banking Berhad's Base Lending Rate (BLR) calculated daily from the Due Date until the date of actual payment. Payments which are overdue by more than sixty (60) days will bear interest at the rate of two percent (2%) per annum above Malayan Banking Berhad's Base Lending Rate ('BLR') (as well as before judgement and after judgment) calculated from the due date until the date of receipt by the Access Provider of full payment. Further, the BLR rate to be used shall be the published rate prevailing on the date of payment.

Clause 3.2.5

3.2.5 Where interest in respect of any due and unpaid amount is due to the Access Provider under Condition 3.2.4, the Access Provider may add the amount of such interest to its next Invoice.

Clause 3.3.5

3.3.5 In the event the Access Provider elects to suspend or terminate the provisioning of the Access Service to the Access Secker for any Site, the Access

Provider shall have the right to use the Security Sum for that Site (together with any interest thereon) to set off any outstanding sum due and payable to the Access Provider by the Access Seeker.

Clause 3.3.6

3.3.6 Subject to Condition 3.3.5 above, upon termination of the Access Agreement or the respective SLO or the use of a particular Site, the Security Sum deposited with the Access Provider or parts thereof, may be returned and/or refunded to the Access Seeker, unless the same had been utilized to settle any outstanding sum to the Access Provider.

Clause 7.1.3

7.1.3 For the avoidance of doubt, the license term for each Site shall be for a period of at least three (3) years commencing from the Commencement Date stated in Item 6 of the SLO and expiring on the expiry date stated in Item 3 of the SLO.

Clause 7.1.7

7.1.7 The Access Charge charged by the Access Provider per Site are as stated in the respective SLO taking into consideration the following basic rates for basic towers (subject to the proviso that the Access Seeker shall only be allowed to install a maximum of Three (3) antennas and One (1) or Two (2) microwave dishes (depending on the infrastructure as per Condition 7.1.5 above) and subject that the maximum diameter of any dishes installed shall not exceed 0.6 meters or 1.2 meters (depending on the infrastructure as per Condition 7.1.5 above) only per Designated Infrastructure):-

Tower Height	Type	2 Way	3 Way	4 Way	5 Way
150 feet	Heavy Duty	RM6,426	RM3,672	RM2,916	RM2,624
200 feet	Heavy Duty	RM8,883	RM5,076	RM4,104	RM3,694
250 feet	Heavy Duty	RM9,450	RM5,400	RM4,320	RM3,888
300 feet	Heavy Duty	RM12,075	RM6,900	RM5,500	RM4,950
350 feet	Heavy Duty	RM15,225	RM8,700	RM6,900	RM6,210
400 feet	Heavy Duty	RM17,325	RM9,900	RM7,900	RM7,110

The Access Provider nevertheless reserves the right to vary the Access Charge at its discretion for any reasons whatsoever.

Cost for User	Additional Access Charge for every RM1,000.00
Cost per User (2 Sharing Parties)	17.32
Cost per User (3 Sharing Parties)	10.83
Cost per User (4 Sharing Parties)	8.66
Cost per User (5 Sharing Parties)	7.58

(The term 'User' shall mean the Access Seeker and the Existing Operators).

Clause 7.1.8

7.1.8 In the event the Access Seeker requests for variation of the Sites, the costs shall be agreed upon between the Operators prior to the commencement of work. In the event that the variation is also to benefit the Existing Operators, approval by the

A Existing Operators to share the costs thereof should be procured by the Access Provider. In any case, the rates in Ringgit Malaysia (RM) per RM1,000.00 of the cost of the Additional Infrastructure under the variation order (for example generator set, cabin etc) are as follows:-

Clause 7.1.9

B 7.1.9 If in the event the number of Users per Site increases, the Access Charges payable by the Users will be revised downwards as per the payment structure above. There shall be no further reduction for the Access Charges if, the Users for any Site exceed five (5).

Clause 10.8.1

C 10.8 Variation

10.8.1 (a) A variation of any part of this Agreement is valid if, and only if, made between and in writing subscribed by the Operators and that the variation in respect of Infrastructure Sharing Services is registered with the Commission in accordance with the Act.

D (b) Subject to Condition 10.8.1(a), where the Operators agree to materially vary the Agreement or access to Infrastructure Sharing Services, the Operators shall inform the Commission in writing of the action the Operators proposes to take and the reasons why such action is appropriate. The Agreement or access to Infrastructure Sharing Services shall not be varied until such time and on such conditions as the

E Commission may specify.

(c) In this Condition 10.8, a reference to a variation includes a reference to an addition, deletion, amendment, modification, alteration or other variation.

Clause 10.1.2

F 10.12 Entire Agreement

10.12.1 This Agreement constitutes the entire agreement of the Operators regarding the subject matter of this Agreement.

G **[13]** Parties had also executed a confidentiality agreement dated 15 September 2011. Nothing turns on the said document.

[14] In fact, I note that based on the pleaded case of the plaintiff, it admits that the terms of the aforesaid agreements 'governs the license agreement H between the plaintiff and the defendant on the usage of the Telecommunication Structures'.

[15] At paras 6–7 of the amended statement of claim, the plaintiff clearly admits that the aforesaid agreements bind the parties subject to the scope of I each respective license. This can be seen from paras 6–28 of the amended statement of claim.

[16] I am aware that in its reply the plaintiff did attempt to add a new reference to the letters of offers ('LOO'), to color the way the said agreements

are to be read. This to me constitutes an attempt to add a new cause of action based on the alleged terms of the LOO contrary to the original amended pleaded case.

[17] I refer to O 18 r 10(1) of the Rules of Court 2012 which is reproduced as follows:

> 10 Departure (O 18 r 10)
>
> (1) A party shall not in any pleading make an allegation of fact or raise any new ground or claim inconsistent with a previous pleading of his.

[18] If any further authority is required to explain the above, I refer to the decision of the High Court in *Mat bin Lim & Anor v Ho Yut Kam & Anor* [1967] 1 MLJ 13 where Raja Azlan Shah J (as he then was) held:

> That being the case, *the reply must not depart from the statement of claim*. In this connection I may as well adopt a passage from the current edition of *Bullen & Leake's 'Precedents and Pleadings'* (11th Ed) at p 694:
>
> > The plaintiff, however, must not set up in his reply a new cause of action which is not raised either on the writ or in the statement of claim; it is provided that 'no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same'. In other words the reply must not contradict or 'depart' from the statement of claim.

I also refer to the decision of the Court of Appeal in *Khazanah Jaya Sdn Bhd v Hisco (Malaysia) Sdn Bhd* [2021] MLJU 2625; [2021] 1 LNS 2196 which reiterates and adopts the decision of Raja Azlan Shah J quoted above.

[19] The appropriate mode that should have been done is to amend the statement of claim and add the additional cause of action based on the terms of the LOO. This was not done; therefore, the plaintiff is not entitled to change his claim on a different footing than what was originally pleaded. I further refer to the decision of Raja Azlan Shah J (as he then was) in *Shanghai Hall Ltd v Chong Mun Foo & Ors* [1967] 1 MLJ 254.

[20] This proposition remains good law as seen even in the England & Wales under their new rules, as seen in *Martlet Homes Ltd v Mulalley & Co Ltd* [2021] EWHC 296 (TCC), which was subsequently affirmed by the English Court of Appeal in the same case *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32.

[21] Even if I am wrong on the above, I find that the plaintiff's own witness did confirm in her witness statement that the formulae for the charges/license are based on the terms of the MLA and AA. I reproduce relevant parts of the

testimony of Subashani a/p Rajoo:

16. Q: Is this provided for in the Master License Agreement

A: Yes, I make reference to Clause 5.1 of the MLA in page 18 of the Ikatan Dokumen Bersama (Bahagian B) (Jilid 1) where it states that the License Fees will commence from the commencement Date and shall be payable by the defendant to the plaintiff every month. I make further reference to Clause 3.14 of the MLA in page 16 of the Ikatan Dokumen Bersama (Bahagian B) (Jilid 1) where it stipulates that the Commencement Date of the license in respect of each Telecommunication Structure shall be equivalent to the Handover Date of the Sites.

17.Q: How much is the monthly License Fees

A: It varies based on the telecommunication infrastructures constructed by the plaintiff and the number of sharers for a particular structure, and the formula is provided in the Master License Agreement and can be seen in Schedule 1 in page 35 to 37 of the Ikatan Dokumen Bersama (Bahagian B) (Jilid 1).

18.Q: How did the defendant approach you in relation to the provision of the new telecommunication structures at the Sites?

A: Since the MLA governs the construction of new towers, the plaintiff and the defendant will jointly head for a Site acquisition. Once the preferred location is identified, the defendant will issue an Authorised Work Order ('AWO') for the plaintiff to obtain the relevant approval and proceed with the construction of the towers. When the towers are ready, the plaintiff will then issue a Handover of Site Key and the defendant will then accept the keys to enter the Site from the plaintiff. Subsequently, the plaintiff will issue a draft Amended Authorised Work Order 'AAWO') to the defendant, along with calculations of fees, to be given to the defendant. Once the defendant verifies the calculations, the plaintiff will then issue an official Amended Authorised Work Order on the letterhead of the plaintiff's Company.

22.Q: What is the arrangement and understanding reached between the plaintiff and the defendant in respect of the existing towers?

A: The plaintiff and the defendant had entered into an Access Agreement ('AA') that governs the leasing of the existing towers and Sites.

25.B. Q: In respect of the License Fee, can you explain to the Court the calculation in respect of the License Fee taking into account the MLA & AA?

A: The License Fee under the MLA & AA is the same.

For standard structure which is the standard 4 legged structure, we will base on plus Schedule 1 of the MLA, the base rate ineludes additional variation order,additional variation rental & additional equipment whereas for non-standard structure such as monopole, lamp pole or structure below or above certain height, we will calculate the fees based on the formula at page 37 of the Ikatan Dokumen Bersama (Bahagian B) (Jilid 1) at paragraph 5 plus the additional variation order, variation rental and additional equipment. In respect of the same, all these would have been calculated and agreed by both parties prior the signing the AWO. Similar terms apply in relation to the AA whereby the rates are as per clause 7.1.7 of the AA at page 60–61 of the Ikatan Dokumen Bersama (Bahagian B)(Jilid 1) for base rates for the standard structure and clause 7.1.11 of the AA at page 61–62 of the Ikatan Dokumen

Bersama (Bahagian B)(Jilid 1) for non- standard structure. In respect of the same, all these would have been calculated and agreed by both parties prior the signing the LOO. As such, the License Fee in AWO/LOO shall apply.

[22] Furthermore, the MLA and AA contain an entire agreement clause that precludes the creation of any new obligations that may contradict the terms of the agreements. I reproduce cl 20.1 of the MLA and cl 10.12.1 of the AA.

Clause 20.1

20. ENTIRE AGREEMENT

20.1 This Agreement is the complete and exclusive statement of this Agreement between the Parties relating to the subject matter or the Agreement and supersedes all previous communications and arrangements, written or oral. Both Parties acknowledge that no reliance is placed on any representations made but not embodied in this Agreement. The Schedules and Annexures hereto shall be read and construed as an essential and/or integral part of this Agreement.

10.12 Entire Agreement

10.12.1 This Agreement constitutes the entire agreement of the Operators regarding the subject matter of this Agreement.

[23] It is trite law that once parties agree that the terms of an agreement shall be encapsulated solely on the written instrument agreed between them, they cannot then renege on the same and rely on new terms that may contradict the aforesaid written instrument. I refer to the decision of Liza Chan Sow Keng JC in *Ismail bin Othman & Ors v Seacera Group Bhd & Ors* [2022] MLJU 374; [2022] 1 LNS 442 where my learned sister explained:

[28] Second, the parties have reached finality in encapsulating all the terms of their bargain in the SSA which has an entire agreement clause housed in cl 16.11.1. In my considered view, this entire agreement clause is of critical pertinence. Further, cl 16.11.2 provide that no variation to the SSA will be effective unless made in writing and signed by or on behalf of SP and Ismail and Zainab. These clauses read with cl 6.5 requiring the resignations of Ismail and his nominees as Directors on completion of the SSA, are unequivocal about the true intention of the parties and blow to smithereens and put paid the improbable existence of the oral 'Board Constitution Agreement' posited by the plaintiffs. In my judgment, there is no room to read into the SSA any other obligations other than what is written therein and no extraneous evidence may be considered to interpret, to supplement or to contradict the parties' obligations already set out in the SSA — *Wong Yee Boon v Gainvest Builders (M) Sdn bhd* [2020] 3 MLJ 571 at p 599; [2020] 2 CLJ 727 (FC); *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585; [2005] 2 CLJ 596 (CA) which approved Abdul Aziz J's pronouncement in *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11; [2002] 4 CLJ 729 where he said at p 25G:

> My opinion is simply this. The entire agreement clause was an agreement between the plaintiffs and the defendants. In agreeing to the clause, the parties

must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92. *By agreeing, therefore, to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s 92. They cannot, therefore, be allowed to prove the second precontractual representation or the oral agreement and to rely on them*. (Emphasis added.)

[24] I also do not find that the plaintiff has pleaded or pursued a claim that is based on any of the exceptions to the above general rule to entitle it to rely on any alleged collateral contract as seen in *Tan Chong & Sons Motor Co Sdn Bhd v Alan Mcknight* [1983] 1 MLJ 220; [1981] CLJ Rep 394 and *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16.

[25] Therefore, I find that the defendant's argument that the rates and charges to be imposed on it must comply with that stated in the MLA and AA is correct. The plaintiff is not entitled to change the terms of the MLA and AA. It cannot simply rely on the rates stated in the LOO without referring to the rates and discounts provided in the MLA and AA.

[26] As to the interpretation of the terms appearing in the MLA and AA, I do not find that there is any dispute as to the meaning to be accorded to what is stated in the written instrument. The mechanism in which courts interpreted the terms of the contract is also now trite. I refer to the decision of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and our Court of Appeal in *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413. The terms are clear and will be applied based on what was agreed between parties.

[27] I find it is worth reminding oneself of what was held by the Federal Court in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 which quoted a passage from the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10:

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913.

It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[28] As I have said earlier, the plaintiff argues that the rates should be looked at based on the terms of LOO of each tower alone and that the clauses as referred above are not applicable.

[29] I find that this argument is not only an affront to the rules of pleadings as I have said earlier and the terms of the contract but are also contrary to s 91 of the Evidence Act 1950. For ease of reference, I reproduce s 91 of the Evidence Act 1950:

When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

[30] In this case, the plaintiff contends that each of the letters of offer ('LOO') determines the rates at which the charges ought to be calculated. The plaintiff argues that charges stated in the schedule appearing in the MLA and AA do not apply and rely on the oral evidence of its witness, PW1 and these were amply argued in paras 61–96 of the plaintiff's submissions.

[31] However, if I were to agree with the plaintiff's contention then the MLA and AA will be made redundant and inapplicable. I do not see any reason why the said MLA and AA ought to be ignored simply because the plaintiff attempted to rewrite the terms it had agreed upon with the defendant.

[32] I also find that the MLA and AA clearly state that LOO does not take precedent over the terms that appear in the master agreements. These agreements clearly state that once the number of users increases, then the plaintiff should have reduced the charges, even if they were to be based on the rates suggested by the plaintiff. What is important is that there should have been a reduction once the number of user has increased.

[33] I reproduce the relevant clauses in MLA and AA:

MLA

Clause 5.3

5.3 In the event that during the duration of the License Term of any Telecommunication Structure, any of the Other Operators shall wish to take a

A license/rent/lease over a portion or portions of any Telecommunication Structures and the same is agreed to by SBC, upon written notification to P1, the Parties hereby agree that the License Fee payable by P1 sball drop to the lower tier as provided in Schedule 1 hereof at the commencement of the following month following the entry of the Other Operators.

B Clause 20.3

20.3 This Agreement shall be the principal Agreement antecedent to the AWO(s).

AA

7.1.7 The Access charge charged by the Access Provider per site are as stated in the C respective SLO taking into consideration the following basic rates

...

7.1.8 If in the event the number of users per site increases, the access charges payable by the users, will be revised downwards as per payment structure above. ...

D

[34] I find that in this case, the defendant has shown to my satisfaction that the number of users at the said site had increased and a reduction of the said rates should have been undertaken by the plaintiff. It is wrong for the plaintiff to ignore the contractual clauses and continue to charge at a higher rate E ignoring the fact that the number of users at the said sites has increased.

[35] The plaintiff's attempt to rewrite the terms is wrong and is not condoned by this court. I refer to the judgment of Lee Hun Hoe CJ (Borneo) in *Lee Soh Hua v Kow Lup Piow & Ors* [1984] 2 MLJ 101; [1984] 1 CLJ Rep F 191 where he held:

> We agree with the learned judge for the reasons he gave that such evidence could not be admitted on the facts of this particular case. It is difficult to imagine not specifically mentioning such important matter as the fulfilment of the said three conditions in the agreement. In considering the totality of the evidence including G the documents it does indicate that the respondents did not know of the said three conditions. In fact, it shows that appellant knew of the three conditions as early as 1967 but in 1975 she thought the said three conditions were not necessary to be complied with in the light of the minute of the Commissioner for Lands and Mines and the letter dated 20 September 1975 to the Council. The respondents made clear H that they would not have offered to pay such price if they knew of the said three conditions. When a contract has been reduced to the form of a document s 91 of the Evidence Act excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless expressly provided in the Act. Also, s 92 of the said Act excludes oral evidence for the purpose of contradicting, varying, I adding to or subtracting from such terms.

[36] I will now address each of the issues that need to be determined by this court as stated in para 9 earlier.

Issue 2 — What are the rates applicable and whether the defendant has been overcharged

[37] For convenience I will first deal with the issue of the applicable rates that should have been charged by the plaintiff. Having considered the relevant clauses reproduce earlier in the attachment in particular cll 4.1, 4.2, 5.1, 5.3 and Schedule 1 of the MLA and cll 7.1.7, 7.1.8, 7.1.9 of the AA, I find that it is wrong for the plaintiff to continue to charge the defendant the full rates despite the increase in the number of users sharing the said tower.

[38] The plaintiff contends that the defendant should be subjected to the formulae (License Fee = Base Fee/Basic Rate (X) + Additional Charges). I appreciate the argument put forward by the plaintiff as its counsel has painstakingly attempted to explain how this is applied and tried to convince me of the alleged inconsistency in the defendant's arguments.

[39] The plaintiff also attempted to explain that as an example cl 7.1.5 to 7.1.7 of the AA applies the said formulae and only that is apparently applicable and agreed between the parties. Therefore, the plaintiff believes that the rates as stated in each of the LOO would be applicable and this court should ignore the remainder of the provisions of the agreements.

[40] I do not find the said argument convincing. As stated earlier, parties did agree that the rates would be reduced if there is an increase in the number of users of the towers as seen in cl 5.3 of the MLA and cl 7.1.9 of the AA, then the rates should be reduced. This court must ensure that all the clauses of the agreements are applied. The contracts must be read as a whole and not read disjunctively as attempted by the plaintiff. For the said reason I do not agree with the interpretation adopted by the plaintiff as being correct.

[41] The above-referred clauses indicate that if the towers are also utilized by other service providers such as Celcom, Digi, YTL, U Mobile and Maxis then the rates will be reduced to a lower sum as reflected in cl 5.3 and Schedule 1 of the MLA and cl 7.1.7 to 7.1.9 of the AA.

[42] The defendant has shown to me that the above service providers have since 30 November 2019 utilised the same telecommunication towers. Therefore, the rates should have been reduced. It is wrong for the plaintiff to charge the defendant the full license rates as they have done since the inception of the MLA and AA.

[43] In this case, the defendant has reproduced evidence to show the number of users of each site contained in the bundle marked as E. The contents of the documents were not successfully refuted by the plaintiff and to me prove that

A the number of the sites claimed by the plaintiff has increased. Thus, the fees chargeable should be reduced based on the terms of the MLA and AA. It is wrong for the plaintiff to ignore the terms merely on the rate charged in the LOOs issued by it. The terms of MLA and AA override and bind parties.

B **[44]** In the circumstances, I agree with the defendant on this issue and find that the rates should have been reduced in accordance with the terms of the MLA and AA. It is wrong for the plaintiff to merely rely on the amount stated in the LOO. Parties are bound by the terms that they have agreed upon and it is for the plaintiff to then make the said deduction and reconcile the amounts due and payable by the defendant, if any.

C

Issue 1 — Whether the plaintiff is entitled to charge for the dates that were left out by the receivers and managers

D

[45] On this issue I find in favour of the plaintiff. I agree that there were license fees and charges that were left out by the receivers and managers when they were in control of the plaintiff.

E **[46]** More so when the sums invoiced by the receivers and managers are based on the information given by the defendant. I refer to the letter issued by the receivers and managers dated 21 November 2018 where it is stated:

> The licence fee amount is per the information provided by Webe Digital on 25 June 2019. In this regard, the Receiver and Managers reserve their rights to vary the invoiced amount ...

F

[47] Once the appointment of the receivers was uplifted, the plaintiff had then reconciled the amount that was invoiced by the receivers and managers and found that there were areas that were not properly invoiced. As a result, the plaintiff then issued invoices to the defendant to ensure that the defendant comply with its contractual obligations to it.

G

[48] On this issue I accept the evidence of the plaintiff's witness as being correct. The defendant cannot escape liability merely because the receivers and managers had made errors when issuing the invoices. There are sites that were left out by the receivers and managers such as Sri Carcosa, Taman Blossom and Hanes Trading.

H

I **[49]** For the above reason, on this issue I find in favour of the plaintiff.

[50] Note, however, the charges payable for the sites are still subject to the rates to be reduced based on the number of users of the telecommunication

towers. It is not open for the plaintiff to now assert that no discount should be given as that proposition is contrary to the terms of the MLA and AA.

Issues 3 and 7 — Whether the plaintiff has validly terminated the Taman Blossom Site and whether the plaintiff is entitled to charge the defendant for the said site

[51] On this issue, I find that the defendant has failed to show that the letter of termination dated 27 February 2018 was served on the plaintiff.

[52] Any termination of any site must be predicated by a letter or notice served personally on the plaintiff. This is provided for in cl 24.1 of the MLA and 10.10.1 of the AA.

[53] The defendant had only produced a copy of the letter but not the actual evidence of receipt by the plaintiff. A copy of the courier slip that acknowledges the delivery of the said letter was not produced by the defendant.

[54] Furthermore, the defendant continued to pay for the usage of the site until 10 January 2019. If indeed the defendant had terminated Taman Blossom site, it should have then alerted the defendant and notified its counterpart that there were errors in the invoicing. This was not done and as such, I find that the alleged termination was not lawfully undertaken in the circumstances of this case.

[55] Therefore, the defendant's counterclaim pertaining to the Taman Blossom site is dismissed.

[56] As I have found that the Taman Blossom site remains chargeable against the defendant, I also find that the plaintiff is entitled to claim for the electricity and administrative costs of the said site. As the agreement remains valid between parties, the plaintiff is entitled to impose charges on the defendant for the Taman Blossom site subject to compliance with all of the terms and conditions contained in the applicable agreement. This would also include the discount, if any, that must be made available to the defendant based on the number of users of the Taman Blossom site.

Issue 4 — Whether the defendant is entitled to deduct the deposit paid, alleged overpayment and alleged overbilling for failure to revise downwards the fees and charges for the sites

[57] As I have found that the plaintiff had wrongfully issued for the wrong amounts to the defendant and that the said charges should have been reduced,

I find that the plaintiff is contractually required to refund the amount overpaid amount, if any, to the defendant. Parties are bound by the terms that they have agreed upon.

[58] The plaintiff should have reduced the amount that it invoiced the defendant to reflect the number of users at each site. The defendant has helpfully produced a table in Bundle Marked as E, the number of users at each site.

[59] I also find that as the plaintiff had failed to comply with the above, the current claim at hand is misconceived. The amount claimed in this proceeding is far higher than what it is contractually entitled to. The plaintiff should have reduced the amount billed to the defendant to reflect the actual rates chargeable.

[60] With regard to the deposit paid by the defendant as per the terms of the MLA and AA, I find that the said sums may be deducted by the plaintiff from the amount actually due to it. It cannot ignore the said amount feign ignorance. The terms of the MLA and AA in particular cl 6.1 to 6.3 of the MLA and cl 3.3 of the AA clearly indicate that the said deposit may either be utilised as payment of the license fees on agreement by parties, in the situation of default by the defendant or must be returned in full at the expiration of tenure.

[61] Therefore, as I have found that the plaintiff had overbilled the defendant for the said sites, the said deposit must be returned to the defendant. It is incorrect for the plaintiff to ignore the deposit paid and merely claim the said sums without taking these into account. That would unjustly enrich the plaintiff and change the character of the deposit to that of a penalty payment which will not be upheld by this court.

Issue 5 — Interest sums claimed

[62] It is clear to me that the sums claimed as interest chargeable by the plaintiff are excessive and contradict the terms of the agreements. The plaintiff's witness suggests that this rate was adopted as it was a simpler version compared to what was agreed upon.

[63] I do not accept such an explanation as that would mean that the plaintiff may change the terms of the contract as it deems fit.

[64] As an example, I reproduce cl 3.2.4 of the AA which clearly show that parties agreed to a much more robust clause that requires evidence of the rates applied by Maybank.

Clause 3.2.4

3.2.4 Save for disputed amounts, it is hereby expressly agreed that the Access Provider is entitled to the payment of interest without prejudice to any other rights of the Access Provider. Interest on due and unpaid amounts is payable (as well as before judgement and after judgment) at the rate of one percent (1%) per annum above Malayan Banking Berhad's Base Lending Rate (BLR) calculated daily from the Due Date until the date of actual payment. Payments which are overdue by more than sixty (60) days will bear interest at the rate of two percent (2%) per annum above Malayan Banking Berhad's Base Lending Rate ('BLR') (as well as before judgement and after judgment) calculated from the due date until the date of receipt by the Access Provider of full payment. Further, the BLR rate to be used shall be the published rate prevailing on the date of payment.

[65] I also do not find any evidence of the interest rate chargeable by Malayan Banking Bhd that is the basis for the calculation under the terms of the MLA and AA. That must first be established before this court could then impose any late payment charges under the terms of the said agreements.

[66] In addition to the above, as I have found that the plaintiff had overbilled by the defendant, there are no sums outstanding based on the current invoices issued. These are wrong invoices that are not binding on the defendant. These need not be paid by the defendant.

[67] As such, there are no late payments due from the defendant to the plaintiff and the plaintiff's claim for interest is a non-starter.

Issue 8 — Whether the plaintiff is entitled to the charge for the new sites

[68] On this issue, I find that the plaintiff is entitled to claim for the license fees for the seven new sites claimed against the defendant.

[69] The defendant did admit in its defence that the sum of RM167,876.66 is due to the plaintiff for the said seven sites. The charges to these sites are also subject to the terms contained in the MLA and AA, whichever is applicable and must take into account the sums that have been paid by the defendant.

[70] For consistency purposes, these charges would have to be calculated based on what was agreed between the parties. However, unlike in the earlier invoices, I am not satisfied that the plaintiff had overbilled the defendant. The LOO for these seven sites was followed by the plaintiff. This is clearly shown when I compare the LOO and the invoices issued to the defendant. I also do not find that the number of users for these sites has increased unlike in the other cases that I have considered earlier.

[71] For these new sites, I find that there is no deduction that ought to be made.

[72] Therefore, for the seven sites I find that the plaintiff is entitled to claim the full sum invoiced minus the 1.5% interest claimed that I have disallowed earlier.

Issue 6 — Electricity and administrative charges

[73] On the issue of electricity and administrative charges, I find that the plaintiff is entitled to claim for the said sums from the defendant. This is provided for in the MLA and AA. The defendant must comply with its obligations to the plaintiff for these charges minus the 1.5% interest claimed against the defendant.

Evaluation of the evidence before me

[74] I find that overall, I find that the evidence of the defendant's witnesses was consistent with the contemporaneous documents when they deal with the fees that should have been charged by the plaintiff. I agree that their evidence is consistent with the documentary evidence before me and that the rates should have been reduced for the towers where the users have increased based on the terms of the MLA and AA.

[75] I also find, as I have said earlier, that the interest claimed by the plaintiff is contrary to the terms of the MLA and AA. The evidence of the plaintiff's witness on this issue contradicts the terms of the agreement and I cannot accept that as being correct despite the allegation and consternation that the rate utilised was simple. This would have been different to what was agreed to by parties as seen in the MLA and AA. As the applicable rates are not before me, I do not believe that the plaintiff has discharged its burden of proof to show that the plaintiff is entitled to the interest rate claimed in its statement of claim.

[76] On the other issues of: (i) Taman Blossom; (ii) electrical and administrative charges; and (iii) the seven additional sites, I find that the evidence of the plaintiff's witness is however consistent with the terms of the agreements referred to earlier.

[77] I, therefore, do not reject the whole of the arguments and contentions put forth by the plaintiff's and defendant's witnesses. I accept partially the position taken by them as these are consistent with the terms of the agreements.

[78] I am obliged to consider the totality of the evidence of the witnesses and the contemporaneous documents. The important issue is whether the conduct

of the parties did comply with their obligations based on the terms of the MLA and AA. As I said, the position taken by the defendant and its witnesses, is consistent with the terms of the agreements.

[79] In coming to the above position, I am mindful of my duties as a trial judge to evaluate the testimony of witnesses and test these against available contemporaneous documents especially the terms of the agreement for this case. I refer to the decision of the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19:

> (2) Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporaneous documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against these. He must also test the evidence of a witness against the probabilities of the case. The principle central to appellate interference is that the decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.

[80] I also refer to the decision of the Privy Council in *Choo Kok Beng v Choo Kok Hoe* [1984] 1 MLJ 165 where it was held:

> if a trial judge feels compelled to reach a conclusion partly favourable to one party and partly to another in a case in which it must at least be plain that one party or the other is not telling the truth, it behoves him to analyse the rival stories with care and to consider their respective probabilities and at least to give reasons for a conclusion.

[81] I further refer to the decision of the Federal Court in *Abdul Ravuff bin Datuk AS Dawood & Ors v Dr Abdul Rahiman bin Datuk AS Dawood (in his personal capacity and as administrator for the estate of Patama @ Ammaji Bibi bt Daud Sah) and other appeals* [2022] 4 MLJ 379; [2022] 5 CLJ 829 where Harminder Singh FCJ stressed the importance of testing of oral evidence with contemporaneous documents by a trial judge.

[82] I have taken heed of the advice given by the superior courts above and evaluated the oral evidence before me to that of the contemporaneous documents shown at trial. As I said, I find partly for each party based on the grounds eluded earlier.

Amount to be refunded by the plaintiff

[83] In view of the above, I find that the plaintiff should refund the following sums to the defendant:

(a) plaintiff's claim:

(i) the outstanding license fees/access charges of the new telecom structures — RM173,312.79;

(ii) outstanding license fees/access charges for existing telecom structures — RM371,714.81; and

(iii) outstanding electricity and administrative charges to the plaintiff — RM393, 099.64.

(b) defendant's claim:

(i) deposits to be returned to the defendant — RM386,533.74; and

(ii) reconciliation of overpaid amount reducing the charges/license fees — RM836,072.75.

RM1,222,606.49–RM938,127.24: Total refund to be paid by the plaintiff to the defendant is RM284,479.25.

[84] For purposes of clarity, I specifically state again that the plaintiff is not entitled to the interest claimed at 1.5%pa as claimed in the statement of claim.

ORDERS OF THIS COURT

[85] For the above reasons, I make the following orders:

(a) the plaintiff should refund the sums of RM 284,479.25 to the defendant; and

(b) no order as to costs.

Order accordingly.

Reported by Ashok Kumar